THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY d/b/a SBC CONNECTICUT, Plaintiff, v. THE CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL; DONALD W. DOWNES, JACK R. GOLDBERG, JOWN W. BETKOSKI, III, LINDA J. KELLY, and ANNE C. GEORGE, in their official capacities as Commissioners of the Connecticut Department of Public Utility Control, Defendants.	Civil Action No.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff The Southern New England Telephone Company d/b/a SBC Connecticut ("SBC Connecticut"), by its attorneys, alleges as follows:

1. SBC Connecticut brings this action under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, for a declaration that the Connecticut Department of Public Utility Control ("DPUC" or "Department") has issued a decision that is preempted by the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 151 *et seq.* ("1996 Act"). By requiring SBC Connecticut to turn over at below-market, cost-based rates to one of its competitors, Gemini Networks CT, Inc. ("Gemini"), certain hybrid fiber-coaxial facilities that are not part of SBC Connecticut's

network and that SBC Connecticut does not use, and has never used, to provide telecommunications services to the general public, the defendant Commissioners of the DPUC have acted in violation of federal law. The Federal Communications Commission ("FCC"), exercising authority delegated exclusively to it by Congress, has concluded that access to these particular facilities is not required under federal law and that requiring such access would be inconsistent with federal communications policy. The Department's challenged orders are also flatly inconsistent with the 1996 Act and the FCC's implementing regulations, and their enforcement would stand as an obstacle to the full accomplishment of Congress's objectives. The orders are therefore preempted. SBC Connecticut seeks declaratory relief to that effect and a permanent injunction preventing Defendants from enforcing the challenged orders.

PARTIES

2. Plaintiff SBC Connecticut is a Connecticut corporation with its principal place of business in the State of Connecticut. SBC Connecticut provides local telecommunications services throughout much of Connecticut. SBC Connecticut is a wholly owned subsidiary of Southern New England Telecommunications Corporation, which is, itself, wholly owned by SBC Communications Inc. ("SBC"), a company organized and existing under the laws of the State of Delaware.

3. Defendant DPUC is a regulatory agency and instrumentality of the State of Connecticut created and existing under the laws of Connecticut with jurisdiction to the extent conferred by Connecticut law over the intrastate activities of telecommunications companies operating in Connecticut. The DPUC is a "State commission" within the meaning of 47 U.S.C. §§153(41), 251 and 252.

4. Defendant Donald W. Downes is a Commissioner and the Chairman of the DPUC. Chairman Downes is sued for declaratory and injunctive relief in his official capacity only.

5. Defendant Jack R. Goldberg is a Commissioner and the Vice Chairman of the DPUC. Vice Chairman Goldberg is sued for declaratory and injunctive relief in his official capacity only.

6. Defendant John W. Betkoski, III, is a Commissioner of the DPUC. Commissioner Betkoski is sued for declaratory and injunctive relief in his official capacity only.

7. Defendant Linda J. Kelly is a Commissioner of the DPUC. Commissioner Kelly is sued for declaratory and injunctive relief in her official capacity only.

8. Defendant Anne C. George is a Commissioner of the DPUC. Commissioner George is sued for declaratory and injunctive relief in her official capacity only.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 47 U.S.C. § 252, and the Supremacy Clause, U.S. Const. art. VI, cl. 2.

10. Venue in this District is proper under 28 U.S.C. § 1391(b).

BACKGROUND

A. The 1996 Act and Federal Regulations

11. Before the 1990s, local telephone service was generally provided in Connecticut and in other states by a single, heavily regulated company such as SBC Connecticut that held an exclusive franchise to provide such service.

12. Congress fundamentally overhauled this system when it passed the 1996 Act. To advance the goal of local telephone competition, the 1996 Act preempts state exclusive franchise laws and imposes certain duties on incumbent local exchange carriers ("incumbent LECs") – *i.e.*,

those carriers that held an exclusive franchise prior to the 1996 Act – to open their markets to competitors (known as "competitive LECs"). *See* 47 U.S.C. §§ 251-253. Among these duties is a requirement that incumbent LECs give competitive LECs access to certain pieces of their preexisting network (referred to by the Act as "network elements"). *See id.* § 251(c)(3).

13. The 1996 Act defines "network element" to include "a facility or equipment used in the provision of a telecommunications service." *Id.* § 153(29). Connecticut law incorporates this federal definition. *See* Conn. Gen. Stat. § 16-247a(b)(7) ("'Network elements' means 'network elements,' as defined in 47 USC § 153(a)(29)."). "Telecommunications service," in turn, is defined under federal law as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Read together, the 1996 Act defines a network element as any facility or equipment used in offering telecommunications directly to the public for a fee.

14. The 1996 Act obligates an incumbent LEC to give competitive LECs "nondiscriminatory" access to certain network elements "on an unbundled basis." *Id.* § 251(c)(3). Unbundled access allows any aspiring competitive LEC to select which network elements it wishes to buy from the incumbent LEC and then recombine those elements to provide a complete telephone service. *See id.* As for price, the Act mandates that unbundled access be sold at below-market rates calculated "based on the cost . . . of providing" the element, including a "reasonable profit." *Id.* § 252(d)(1)(A).

15. Not all of the incumbent LEC's network elements need to be provided to competitors pursuant to the Act's unbundling requirement. For network elements that are deemed "non-proprietary," an incumbent LEC is only required to unbundle those network

elements for which the failure to provide unbundled access would "impair" the ability of other carriers to provide competing service. *Id.* § 251(d)(2)(B). The Act assigns to the FCC the task of interpreting the Act's "impairment" standard and of "determining what network elements should be made available." *Id.* § 251(d)(2); *see also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004) ("*USTA II*"). States may not enforce their own unbundling requirements unless they are "consistent with" § 251's requirements and the FCC's implementing regulations, and such state requirements may not "substantially prevent implementation of" the purposes of the Act. 47 U.S.C. § 251(d)(3)(B), (C). In passing the Act, "Congress validly terminated the states' role in regulating local telephone competition," and "validly preempted state regulation over competition to provide local telephone service." *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania, Inc.,* 271 F.3d 491, 510 (3d Cir. 2001).

16. The 1996 Act additionally directed both the FCC and state commissions to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . regulating methods that remove barriers to infrastructure investment." 1996 Act, § 706(a) (reprinted at 47 U.S.C. § 157 note).

17. In August 2003, in its third attempt to implement the 1996 Act's "impairment" standard for unbundled access to non-proprietary network elements,[1] the FCC issued its

[1] The FCC's first two attempts had been vacated by the Supreme Court and the D.C. Circuit: **(1)** *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002); **(2)** Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

Triennial Review Order.[2] At least five of the FCC's determinations in the *Triennial Review Order* are directly relevant to this case:

18. *First*, the FCC held that competitive LECs are not impaired without access to facilities used to provide broadband services – *i.e.*, high-speed, high-capacity transmission facilities. *Triennial Review Order*, 18 FCC Rcd at 17133-34, ¶ 258; 17141-42, ¶¶ 272-273.

19. *Second*, the FCC concluded that incumbent LECs have no obligation to unbundle loop facilities that consist of both copper wires and fiber-optic cables – so called "hybrid loops" – for use in provisioning broadband services. The FCC did, however, require incumbent LECs to provide unbundled access to "narrowband" capabilities.[3] "Narrowband" refers to facilities capable of providing services such as traditional voice, fax, and dial-up modem applications. "Broadband," on the other hand, refers to facilities that are capable of transmitting large amounts of data (including combinations of music, video, and voice) at much higher speeds. Where an incumbent carrier has deployed these hybrid loop facilities, the carrier can satisfy its unbundling obligations by either providing access to a pure copper wire running from its central office to a particular customer premises or by providing a narrowband transmission path running over the

[2] *See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"). *vacated in part and remanded on other grounds*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending*, *NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004). Several portions of the *Triennial Review Order* were vacated on the grounds that the FCC had, once again, adopted a policy of maximum unbundling, flouting the clear directive of Iowa Utilities Board and USTA I. *See generally USTA II*, 359 F.3d 554. However, competitive LECs and various state commissions had challenged other portions of that same order – including the FCC's decision not to require the unbundling of the facilities that the DPUC has found to be "equivalent" to those at issue in this proceeding – and the D.C. Circuit rejected those challenges in their entirety. *Id.* at 580 (holding that FCC could reasonably "withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment").

[3] Specifically, the FCC found that incumbent LECs have no obligation to unbundle their hybrid fiber/copper loops for the deployment of "broadband" service but that they remain obligated to provide "unbundled access to the TDM features, functions, and capabilities of their hybrid loops" or alternatively, to a home-run copper loop. The FCC found that "this will allow competitive LECs to continue providing both traditional narrowband services (e.g., voice, fax, dial-up Internet access) and high-capacity services like DS1 and DS3 circuits." *See Triennial Review Order*, 18 FCC Rcd at 17103-04, ¶ 200 & n.627, 17153-54, ¶ 296.

hybrid facilities. *Id.* at 17153-54, ¶ 296. The FCC found that competitive carriers, such as Gemini, do not face impairment in their ability to provide telecommunications services so long as they have access to facilities that can be used to provide voice services. *Id.* at 17151, ¶ 291.

20. *Third*, as part of its impairment analysis, the FCC expressly rejected any consideration of "whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs [unbundled network elements]." *Id.* at 17056-57, ¶ 115. In other words, the FCC concluded that "we cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired." *Id.* Instead, the FCC held that the 1996 Act requires it to ask whether carriers can provide competitive services without unbundled access to a particular network element.

21. *Fourth*, in determining whether carriers would be impaired in the absence of unbundling, the FCC found it essential to consider the availability of facilities from alternative sources, including other network elements, self-provisioning, and third parties, as well as from carriers using entirely separate networks (such as cable facilities) – so-called "intermodal" competition. *Id.* at 17035, ¶ 84; 17151, ¶ 291.

22. *Finally*, the FCC concluded that section 251(d)(3) of the 1996 Act only permits state commissions to establish additional unbundling obligations pursuant to their state law authority when such unbundling is "consistent with the requirements of section 251," including the "impair" test set forth in section 251(d)(2), and the state determination does not "'substantially prevent' the implementation of the federal regulatory regime." *Id.* at 17100, ¶ 193; *see also* 47 U.S.C. § 251(d)(3).

23. Where the FCC has found no impairment with respect to a particular network element or otherwise declined to order that a network element be unbundled – and certainly

where the FCC has expressly concluded that requiring the unbundling of these facilities "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706," *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288 – any contrary state decision would invariably "frustrate" federal policy and "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

24. The 1996 Act requires that the terms according to which an incumbent LEC provides access to its network be incorporated into a binding "interconnection agreement." *See* 47 U.S.C. § 251(c)(1) (describing incumbent LEC's duty to negotiate in accordance with section 252 "the particular terms and conditions of agreements to fulfill the duties" enumerated in sections 251(b) and (c)). In the event that the incumbent and competitive carriers cannot reach agreement on all of the terms of access to the incumbent's network, either party may petition the appropriate State commission to arbitrate outstanding issues in accordance with the terms of the 1996 Act. *See id.* § 252(b)(1).

B. SBC Connecticut's Hybrid Fiber Coaxial Facilities

25. In 1995, SBC Connecticut began constructing an HFC network, parallel to, but separate and distinct from, the existing copper network that SBC Connecticut used to provide telecommunications services. Believing that this network might eventually offer significant cost savings and efficiencies, SBC Connecticut designed the HFC network to be a replacement for its legacy copper facilities and to support a full suite of telecommunications, data, and video

services.[4] This promise failed to materialize. In 1996, after several telecommunications carriers announced that they would no longer pursue an HFC strategy, the primary manufacturers and suppliers of HFC equipment and components decided to abandon the HFC marketplace.[5] Because of this industry upheaval, and growing evidence that HFC did not offer a technologically feasible and economically viable platform for carrying telecommunications services, SBC Connecticut elected to forego its HFC plans.

26. In fact, SBC Connecticut never offered telecommunications services over the HFC facilities.[6] Although SBC Connecticut did conduct a *trial* of HFC-based telephony back in 1995, SBC Connecticut never offered its service to the general public. *See* 47 U.S.C. § 153(46) (defining a "telecommunications service" as "the offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used") (emphasis added). For some years, SBC Connecticut did lease the coaxial portion of the HFC network to SNET Personal Vision, Inc. ("SPV"), which used the coaxial facilities to provide *cable television* service. But once it became apparent that SPV could not support the construction plans that had been adopted back in 1994, SPV petitioned the DPUC for a modification of its franchise agreement and a waiver of several build-out requirements that the DPUC had originally imposed. The DPUC recognized that the HFC technology had substantially changed since SPV began its cable rollout, and that market changes

[4] A diagram showing the components of SBC Connecticut's HFC network, and comparing them to the legacy local network, is attached as Exhibit A hereto.

[5] *See* Final Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02, at 27 (DPUC Dec. 17, 2003) ("*Gemini Decision*") (attached as Exhibit B hereto).

[6] *See* Declaration of John A. Andrasik, *Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company To Unbundle Its Hybrid Fiber Coaxial Facilities*, WC Docket No. 04-30, ¶ 4 (Feb. 9, 2004) ("Andrasik Decl.") (attached as Exhibit C hereto).

had commercially impaired SPV's ability to meet its franchise obligations.[7] When, the following year, SPV petitioned the DPUC for permission to withdraw from the cable television marketplace altogether, the DPUC granted SPV's request.[8]

27. The DPUC also determined that 85 percent of SBC Connecticut's HFC facilities – including *all* of the facilities that are the subject of this Complaint – were not used or useful for telecommunications.[9] Accordingly, those facilities were taken off of SBC Connecticut's regulated books and the attendant losses were borne by SBC Connecticut's shareholders. A significant portion of these facilities have already been physically removed.[10]

C. The Proceedings Before the DPUC

28. On June 25, 2002, Gemini sent SBC Connecticut a request to negotiate an interconnection agreement pursuant to section 252 of the 1996 Act. Gemini specifically sought access to SBC Connecticut's retired HFC network on an unbundled basis under 47 U.S.C. § 251(c)(3) and Connecticut General Statutes § 16-247b, at prices set according to the subsidized, cost-based rates applicable to unbundled network elements.[11] After a meeting with Gemini's representatives, in which SBC Connecticut sought clarification of Gemini's request and described the nature of the HFC facilities, SBC Connecticut sent a series of letters explaining that the facilities in question were not subject to unbundling under federal or state law. In

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[7] *See* Decision, *Application of SNET Personal Vision, Inc. to Modify Its Franchise Agreement*, Docket No. 99-04-02 (DPUC Aug. 25, 1999).

[8] *See* Decision, *Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity*, Docket No. 00-08-14 (DPUC Mar. 14, 2001) ("*Franchise Relinquishment Decision*").

[9] *Id.*

[10] *See* Andrasik Decl. ¶ 6.

[11] SBC Connecticut was willing to sell the remaining HFC facilities to Gemini at a negotiated, market-based rate. Gemini refused, however, instead insisting that it was entitled to purchase these facilities at cost-based rates and thereby have SBC Connecticut bear the costs associated with its market entry.

particular, SBC Connecticut explained that neither the FCC nor the DPUC had ever held that hybrid fiber-coaxial facilities had to be unbundled. SBC Connecticut also noted that the HFC facilities were not a part of its local telecommunications network and had never been used to provide telecommunications services. Accordingly, the HFC facilities fell outside of the statutory definition of a "network element." Furthermore, because competitive carriers such as Gemini could offer a full range of telecommunications services using the UNEs that SBC Connecticut does make available to every requesting carrier, Gemini could not possibly be impaired in its ability to provide such services without access to the HFC facilities.

29. After missing the statutory deadline for requesting arbitration under section 252(b) of the 1996 Act, Gemini filed a Petition for a Declaratory Ruling with the DPUC.[12] In its Petition, Gemini asked the DPUC to "declare that certain [HFC] facilities owned by [SBC Connecticut] and formerly leased to [SPV] constitute [UNEs] and as such must be tariffed and offered on an element by element basis for lease to Gemini." Petition at 1. Gemini asserted that the HFC facilities fell within the definition of a "network element" and therefore had to be unbundled. *See id.* at 4-5. Gemini additionally asked the DPUC to initiate an expedited cost of service proceeding and to order SBC Connecticut to provide an immediate inventory of its remaining HFC plant.

30. SBC Connecticut filed a Motion to Bifurcate the Proceedings on January 10, 2003, wherein it asked the DPUC to adjudicate the legal question of whether it had any authority over SBC Connecticut's HFC facilities before considering the fact-intensive and complex issues associated with whether the various HFC facilities were subject to unbundling. When the DPUC

[12] *See* Petition for Declaratory Ruling, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC filed Jan. 2, 2003) ("Petition") (attached as Exhibit D hereto).

took no action on its bifurcation request, SBC Connecticut filed a Motion to Dismiss Gemini's Petition on January 21, 2003.[13] Therein, SBC Connecticut also reiterated its bifurcation request, asking the Department to establish a carefully staged schedule that would avoid costly and unnecessary administrative proceedings.

31. The DPUC denied SBC Connecticut's Motion by order dated February 10, 2003,[14] reasoning that it had the statutory authority to consider Gemini's request because "the Petition acknowledges the requirements of § 251(c)(3) of the [1996] Act and the Department's ability to require, pursuant to Conn. Gen. Stat. § 16-247b(a), the unbundling of telephone company networks when conditions warrant." *February Order* at 4. The DPUC did, however, adopt a modified form of the bifurcation that SBC Connecticut had requested.

32. The parties submitted several rounds of comments and briefs focused largely on whether the HFC facilities were used for the provision of a telecommunications service and on whether the DPUC had the legal authority to require unbundling. Following release of the *Triennial Review Order*, the DPUC reopened the docket and requested further comments on the effect of the FCC's recent order, if any, on Gemini's Petition. As SBC Connecticut explained in its written comments, the *Triennial Review Order* independently compelled the dismissal of Gemini's Petition. Because the FCC had held, as a matter of binding federal law, that carriers are not impaired in their ability to provide basic voice service so long as incumbent LECs offer unbundled access to copper loop facilities, and because it was undisputed that SBC Connecticut

[13] *See* Motion of the Southern New England Telephone Company to Dismiss the Petition Filed By Gemini Networks CT, Inc. or, in the Alternative, Motion to Stay and/or Bifurcate Issues and Request For Procedural Order, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC filed Jan. 21, 2003) ("Motion") (attached as Exhibit E hereto).

[14] *See* DPUC Letter to P. Garber and J. Janelle, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (Feb. 10, 2003) ("*February Order*") (attached as Exhibit F hereto).

offers such facilities, federal law precluded the DPUC from ordering SBC Connecticut to unbundle its decommissioned HFC facilities. SBC Connecticut further demonstrated that the FCC had held that it would be inconsistent with the goals of the 1996 Act and federal policy to require incumbent LECs to unbundle broadband facilities.

33. On December 17, 2003, the DPUC issued its *Gemini Decision*. Therein, the DPUC acknowledged that "this proceeding has been bifurcated to address the legal issues." *Gemini Decision* at 24. After a lengthy discussion of the 1996 Act's unbundling standard, set forth in 47 U.S.C. § 251(d)(2), the evolution of the FCC's interpretation of the statutory impair standard, *see Gemini Decision* at 24-33, and the DPUC's authority under Connecticut state law, the DPUC concluded that the 1996 Act "provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC," *id.* at 34. Section 16-247b of the Connecticut General statutes, the DPUC continued, "also provide[s] the Department with the authority to require the unbundling of ILEC network elements." *Id.*

34. Having determined that it had the statutory power to require unbundling, the DPUC went on to reject SBC Connecticut's argument that it nevertheless lacked authority over SBC Connecticut's HFC facilities because they had never been used, and were not readily capable of being used, to provide telecommunications services and therefore did not fall within the statutory definition of a "network element." According to the DPUC, facilities do not need to be "currently used" in order to satisfy the definition of a network element. *See id.* at 36. Rather, the DPUC claimed, "the FCC require[d] that unbundled access to network elements that are 'capable of being used' be provided to competitors." *Id.* Because the HFC facilities "[have] already been deployed and could be placed into service by Gemini," the DPUC concluded, it is irrelevant that they have never been used to provision telecommunications services. *Id.* Since the HFC

facilities were "constructed in part and intended by the Company to provide a full complement of voice data and video services . . . , the capability existed for provision of those services and as such, the HFC network should be unbundled." *Id.* Accordingly, the DPUC held that SBC Connecticut's HFC network "meets the definition of a 'network element,' and therefore it must be unbundled." *Id.*

35. The DPUC also reasoned that the HFC facilities must be unbundled because they appeared similar to the hybrid loops addressed in the *Triennial Review Order*. Notwithstanding the FCC's holding that incumbent carriers *need not* unbundle hybrid loops so long as the incumbent offers a copper loop alternative, *see Triennial Review Order*, 18 FCC Rcd at 17153-54, ¶ 296, the DPUC inexplicably asserted that "the FCC has required" that "hybrid fiber loop components . . . be unbundled." *Gemini Decision* at 37. On the basis of the DPUC's conclusion that the HFC network and the hybrid fiber loop components were "equivalent," and its misreading of the *Triennial Review Order*, the DPUC concluded that, "[t]herefore, these components should be unbundled." *Id*.

36. The DPUC never seriously addressed SBC Connecticut's argument that the HFC facilities were not a part of the company's local telecommunications network and therefore could not be subject to unbundling. *See id.* at 38. Even though facilities outside of an incumbent's local network cannot fall within the statutory definition of a network element, and do not fall within the definition of any of the unbundled network elements SBC Connecticut is required to provide to competitive carriers, the DPUC dismissed this argument on the ground that it had "already determined that the HFC network is a network element that should be unbundled." *Id.* However, the DPUC has never defined the specific unbundled network elements it believes SBC Connecticut must make available to Gemini from the HFC network or otherwise attempted to

address how such facilities could possibly meet the definition of any UNE the FCC has found that SBC Connecticut must make available to competitors under section 251(c) of the Act.

37. Likewise, having already concluded that "the HFC network is a network element that should be unbundled," *id.*, the DPUC then purported to apply the "impair" standard that is itself a *prerequisite* to unbundling under the 1996 Act and the Connecticut General Statutes, *see id.* at 39. In considering whether carriers would be impaired in their ability to provide telecommunication services, the DPUC applied a test for impairment that had been vacated by the D.C. Circuit in *USTA I* and repudiated by the FCC on remand in the *Triennial Review Order*. The DPUC reasoned that "Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network," *id.* at 41, and that SBC Connecticut's "imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the Petition would seriously harm, if not destroy, Gemini's business plan and business," *id.* at 42. Refusing to consider the availability of other UNEs through which Gemini could provide narrowband service, the DPUC held that "[t]o require Gemini to utilize UNEs other than the HFC network conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market uneconomic." *Id.* The DPUC did not identify the FCC finding upon which it purported to rely. Yet the only relevant FCC finding discussed in the DPUC Order – that which addresses hybrid copper-fiber loop facilities – reached precisely the opposite conclusion. *See Triennial Review Order*, 18 FCC Rcd at 17151, ¶ 291. Instead, the DPUC reiterated its holding that SBC Connecticut's HFC network must be unbundled, and it directed SBC Connecticut and Gemini to negotiate the terms of an interconnection agreement under section 252 of the 1996 Act.

D. Subsequent Proceedings and Remand

38. On January 29, 2004, SBC Connecticut appealed the DPUC's *Gemini Decision* to Connecticut Superior Court, challenging the DPUC's decision on numerous state-law grounds.[15] Specifically, SBC Connecticut alleged that the DPUC violated the Connecticut Uniform Administrative Procedure Act by deciding factual issues such as whether it was even technically feasible for SBC Connecticut to provide unbundled access to the HFC facilities – a statutory prerequisite to unbundling under Connecticut state law – without first providing notice or the opportunity for a hearing or discovery. Moreover, SBC Connecticut alleged that the DPUC acted beyond its authority under section 16-247b of the Connecticut General Statutes law by requiring the unbundling of facilities that were not part of SBC Connecticut's telephone network, not used by SBC Connecticut to provide telecommunications services, not "network elements" as that term is defined under Connecticut law, and not "necessary" in order to permit other carriers to provide telecommunications services.

39. After the parties briefed the state-law issues (which were, by agreement, the only issues to be decided in this case), Judge McWeeny of the Connecticut Superior Court issued a decision reversing the DPUC's *Gemini Decision* on the grounds that the DPUC had failed to make the necessary findings under Connecticut law that the HFC facilities "are technically feasible of being tariffed and offered separately or in combinations." Conn. Gen. Stat. § 16-

[15] SBC Connecticut's verified complaint also included a count alleging violations of the 1996 Act and of the FCC's implementing regulations. As the case proceeded to briefing, however, it was clear that all parties agreed that only the state law issues were properly before the court. *See* Transcript, *Southern England Telephone Co. v. Department of Pub. Util. Control*, CV-040525443S, at 28 (Conn. Sup. Ct. Feb. 23, 2004) ("We'll resolve the State statutory claims here."). SBC Connecticut moved for summary judgment only on the state law counts. In its opposition to summary judgment, Gemini and the DPUC addressed only the state law issues. *See also infra* ¶ 42 & n.19 (discussing SBC Connecticut's FCC petition, in which it had addressed the federal claims).

247b(a).[16] As Judge McWeeny recognized, the DPUC did not even mention "technical feasibility" in its 50-page decision or in its 41 findings of fact and conclusions of law, and "the decision fails to contain any subordinate facts or discussion which confront the technical feasibility issue under any euphemism." *Southern New England Tel. Co. v. Connecticut Dep't of Pub. Util. Control*, CV040525443S, 2004 Conn. Super. LEXIS 1032, *12 (Conn. Sup. Ct. Apr. 1, 2004). The court vacated the *Gemini Decision* and remanded the case to the DPUC "to address the determinations and findings mandated by Connecticut General Statutes § 16-247(a)." *Id.* at *14.

40. The DPUC reopened the docket for the limited purpose of addressing the technical feasibility issue identified by the superior court. After holding two days of public hearings and reviewing post-hearing briefs, the DPUC ruled that SBC Connecticut had failed to rebut the presumption of technical feasibility and that, "[t]herefore, . . . it is technically feasible to unbundle [SBC Connecticut's] HFC network subject to federal and state unbundling requirements."[17] The DPUC rejected Gemini's claim that it should be permitted to manage and maintain the HFC facilities, concluding that it "has always placed a premium on network reliability and finds no reason at this time why other than [SBC Connecticut] employees should have access to Company facilities." *Remand Decision* at 4. It ordered the parties, as part of their negotiations over the terms of an interconnection agreement, to negotiate "the applicable rates

[16] In dicta, Judge McWeeny found "that the DPUC correctly determined that the HFC facilities constitute UNEs (unbundled network elements) which are used to provide telecommunication [sic] services and that their unbundling is in the public interest and consistent with federal law." 2004 Conn. Super. LEXIS 1032, at *7. Judge McWeeny's "finding" constituted nothing more than a recognition that the DPUC had, in fact, found under Connecticut law that state law requirements for unbundling had been satisfied. The Court clearly did not purport to rule on a question of federal law, and the "finding" was unnecessary to the judgment that the DPUC had failed to comply with the requirements of state law in issuing its *Gemini Decision*.

[17] Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02RE01, at 7 (DPUC Aug. 25, 2004) ("*Remand Decision*") (attached as Exhibit G hereto).

and charges that Gemini would incur when [SBC Connecticut-]approved technicians repair, upgrade and maintain the HFC facilities that are located in the communications gain in the public rights of way." *Id.*

41. In the *Remand Decision*, the DPUC reiterated its conclusion that it had authority under Connecticut law "to require the unbundling of ILEC network elements" and that SBC Connecticut's "HFC network met the definition of a 'network element' and must be unbundled." *Id.* at 2.[18] The Department ordered SBC Connecticut and Gemini to commence negotiations over the terms of an interconnection agreement under which Gemini would obtain access to SBC Connecticut's HFC facilities.

42. On February 10, 2004, SBC Connecticut filed an Emergency Request for Declaratory Ruling and Preemption with the FCC.[19] SBC Connecticut requested that the FCC issue a declaratory ruling holding that the DPUC cannot, consistent with federal law, require SBC Connecticut to unbundle its decommissioned HFC facilities. Notwithstanding SBC Connecticut's request for emergency consideration, the FCC has not taken any action on the request. The FCC's authority to act is entirely discretionary, and there is no time limit in which it must rule on SBC Connecticut's request.[20] As the DPUC made clear in its recent *Remand*

[18] The Department erroneously asserted that this determination had been "upheld by the Connecticut Superior Court." *Id.* That is incorrect as a matter of law. The question whether the DPUC had authority to order the unbundling of these facilities notwithstanding contrary conclusions by the FCC under federal law was not a question either presented to the Superior Court or necessary to the judgment.

[19] Emergency Request for Declaratory Ruling and Preemption, *Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company To Unbundle Its Hybrid Fiber Coaxial Facilities*, WC Docket No. 04-30 (FCC filed Feb. 10, 2004).

[20] Indeed, the DPUC expressly urged the FCC *not* to act prior to the issuance of the *Remand Decision* because the "Final Decision may make [SBC Connecticut's Emergency Request], the subject of WC Docket No. 04-30, moot." Ex Parte Letter of Louise E. Rickard, Acting Executive Secretary, DPUC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-30, at 1 (July 26, 2004). Obviously, the *Remand Decision* has not made SBC Connecticut's request for relief moot; indeed, it has only confirmed the urgent necessity for such relief.

Decision, SBC Connecticut and Gemini must now embark on a detailed negotiation process over the terms under which SBC Connecticut will unbundle its HFC network – a process that is not only costly and time-consuming but that is entirely unwarranted given the fact that the very facilities over which SBC Connecticut and Gemini will be negotiating are not subject to unbundling under federal law and should not, therefore, be the subject of any interconnection agreement negotiations under section 252. The time has come to put an end to this unlawful process and declare that the DPUC exceeded its authority under state law in ordering SBC Connecticut to unbundle these HFC facilities in clear contravention of the requirements of both federal law and federal telecommunications policy as articulated by the FCC.

COUNT ONE

(The DPUC's Requirement That SBC Connecticut Unbundle Its HFC Facilities is Preempted by Federal Law)

SBC Connecticut restates and incorporates by reference each and every allegation in paragraphs 1 through 42 as if fully set forth here.

43. The DPUC's requirement that SBC Connecticut provide access to its decommissioned HFC facilities on an unbundled basis is preempted by federal law. The FCC has definitively determined in its *Triennial Review Order* that incumbent carriers are not required to unbundle broadband facilities. The FCC has already concluded that applying section 251(c) unbundling obligations to next-generation facilities such as the HFC facilities at issue in this case would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities." *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288.

44. Moreover, the FCC has specifically concluded that carriers are not impaired without access to hybrid copper-fiber facilities that the DPUC itself concluded were "equivalent" to the

HFC facilities at issue in this case. So long as they provide narrowband facilities with which competing carriers are able to provide telecommunications services, incumbent carriers need not unbundle their hybrid fiber facilities. It is undisputed that SBC Connecticut provides to Gemini and all other competitive carriers in Connecticut with unbundled access to narrowband facilities to the extent required by federal law. The DPUC's determination essentially requires SBC Connecticut to subsidize the business plan of a single competitor, encouraging the purely synthetic competition that the D.C. Circuit repudiated in *USTA I* and in *USTA II*.

45. The DPUC's requirement is inconsistent with congressional intent, as expressed in the plain language of the 1996 Act, and will substantially prevent implementation of the federal unbundling regime. Moreover, it will frustrate the FCC's efforts to promote a vibrant market for broadband services, a goal that "is vital to the long-term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies." *Id.* at 17110, ¶ 212; *see also USTA II*, 359 F.3d at 564 (recognizing that, by not extending the unbundling obligation to the facilities at issue here, the FCC "brought into the balance the risk that an unbundling order might deter investment in such facilities – contrary, as it saw the matter, to the statutory goal of encouraging prompt deployment of 'advanced telecommunications capability.'").

COUNT TWO

(The DPUC's Requirement That SBC Connecticut Unbundle Its HFC Facilities Violates Federal Law)

SBC Connecticut restates and incorporates by reference each and every allegation in paragraphs 1 through 45 as if fully set forth here.

46. To the extent that the DPUC retains any authority to order the unbundling of network elements that the FCC has chosen not to unbundle, that authority must be exercised in a

manner "consistent with the requirements of section 251" and in such a way that it does not "'substantially prevent' the implementation of the federal regulatory regime." *Triennial Review Order*, 18 FCC Rcd at 17100, ¶ 193 (quoting from 47 U.S.C. § 251(d)(3)).

47. The DPUC lacks authority to order the unbundling of the HFC facilities at issue in this case because such facilities do not satisfy the definition of a "network element" under the 1996 Act. Such facilities have never been "used in the provision of a telecommunications service." 47 U.S.C. § 153(29).

48. In establishing the applicable unbundling standards, the FCC expressly rejected the argument that it should evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs. *See Triennial Review Order,* 18 FCC Rcd at 17056-57, ¶ 115. According to the FCC, "such a subjective, individualized approach could give some carriers access to elements but not others, and could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs." *Id.*. The FCC agreed that it "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired." *Id.* Moreover, any unbundling analysis requires an examination of concrete evidence, including evidence of competitive alternatives such as self-provisioning, facilities of third parties, and other UNEs. *Id.* at 17035, ¶ 84, 17151, ¶ 291. The DPUC's orders completely ignored each of these clear instructions.

49. The DPUC's *Gemini Decision* also runs afoul of the D.C. Circuit's *USTA I* and *USTA II* decisions. In *USTA I*, the D.C. Circuit explicitly rejected an unbundling analysis that focused exclusively on the particular technology or service that carriers seek to offer, without regard to the competitive context as a whole. There, as here, unbundling the coaxial facilities would impose tremendous costs on SBC Connecticut under conditions where there is "no reason

to think doing so will bring on a significant enhancement of competition." 290 F. 3d at 490. In *USTA II*, the D.C. Circuit stressed again that any impairment rule must "take into account not only the benefits but also the costs of unbundling (such as discouragement of investment in innovation), in order that its standard be rationally related to the goals of the Act." 359 F.3d at 572 (internal quotation marks omitted).

50. Like every other competitive carrier in Connecticut, Gemini can utilize SBC Connecticut's existing UNE offerings to provide telecommunications services in accordance with the terms of the FCC's *Triennial Review Order*. While the D.C. Circuit found that Congress did not sanction an analysis routed in a belief "in the beneficence of the widest possible unbundling," the DPUC has done precisely that. *USTA I*, 290 F.3d at 425.

PRAYER FOR RELIEF

WHEREFORE, SBC Connecticut prays that this Court grant it the following relief:

a. enter judgment in favor of Plaintiff, declaring pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the DPUC's decision requiring SBC Connecticut to provide Gemini with unbundled access to its HFC facilities is preempted by federal law or, in the alternative, violates the clear limitations imposed by federal law on the unbundling of the incumbent carrier's facilities;

b. permanently enjoin all defendants, and anyone acting in concert with them, from enforcing or attempting to enforce any DPUC orders (or approved interconnection agreements) purporting to require the unbundling of the HFC facilities at issue in this case; and

c. grant such other relief as the Court deems just and proper.

Respectfully submitted,

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